ART. V. — *A Treatise on the Law of Copyright in Books, Dramatic and Musical Compositions, Letters and other Manuscripts, Engravings and Sculpture, as enacted and administered in England and America, with some Notices of the History of Literary Property.* By GEORGE TICKNOR CURTIS, Counsellor at Law. Boston: Little & Brown. 1847. 8vo. pp. 450.

THE notion of literary property, as it is now entertained, belongs to the peculiar form of modern civilization. An ancient writer would as soon have thought of monopolizing sound, and putting speech itself into a private inclosure, as of securing a permanent and lucrative possession of the creations of his brain. It is true that a momentary property, if we may call it so, was enjoyed by the oldest bards, in their songs; but the enjoyment of any benefit from it was secured only by the personal presence of the singer. The minstrels of the time of Homer, and the rhapsodists who succeeded them, made a precarious living by travelling over Ionia and Greece, and entertaining the assemblies of their countrymen with narrative ballads celebrating the deeds of their forefathers. But the sweet song which the Muse gave to the blind old bard in requital for the loss of his sight was no commodity to be disposed of in the market. Delighted audiences hung entranced upon his inspired lips, and a place of honor was assigned him at the festivals. Good cheer, in full measure and running over, was his at the hospitable boards of kings and princes; perhaps he was better off in this respect than some of his modern brethren of the craft, with all the advantages of copyright conferred upon them by the law.

A more definite and tangible gain was secured by the lyric poets of Pindar's age. The extravagantly overestimated glories of the victors in the national games created an immense demand for the works of the genius that could sing them in befitting strains. Surely never since have runners, racers, boxers, and pancratists been honored with such lavish and brilliant displays of poetic ornament and imagery, as in the immortal Odes of Pindar; and the princely rivals for the wreath of pine or parsley, the splendid rulers of Syracuse, or Gela, or Cyrene, showed their sense of the value

of the poet's numbers by such substantial acknowledgments as few receive in these degenerate days. "A mere song" was a phrase of quite different import at the court of Hiero or Arcesilaus from that which it bears in the present usage. The Attic tragedians may have received something from the *theoric* treasury for their works, but that is doubtful; the glory of a tragic victory was enough to stimulate the highest genius to the utmost tension of its powers. The rhetoricians and sophists, however, were a money-making race. The former wrote speeches for litigating parties, who could not write them for themselves; and the latter travelled from city to city, like the itinerant lecturers of the present age; and of both classes many were successful in accumulating large fortunes by their literary labors. Isocrates and Gorgias were wiser in their generation than the children of light.

That books were a common article of trade in Athens, at a very early period, there can be but little doubt; and that a thriving business was driven by the bibliopoles of that busy city is equally probable. The bookseller and the copyist, — the *βιβλιοπώλης*, and the *βιβλιογράφος*, — and private and public libraries, in Athens, and other cities of the Grecian world, bear ample witness that the bookmaking business was not among the smallest or most insignificant of the trades that were plied in the Hellenic states. The story of the Homeric poems in the age of Pisistratus proves at least that public collections under the patronage of governments go back to a very remote period; while the literary treasures accumulated at Alexandria imply an extensive and organized industry in the production, multiplication, and distribution of works in every branch of literature, science, and criticism. But what rewards the authors received, what rights of property they enjoyed beyond the ownership of the original autograph copy, we have no means of ascertaining.

At Rome, large libraries, both of Greek and Roman literature, were collected certainly as early as the time of Cicero, — probably earlier. What an eager purchaser of books the great orator himself was is exhibited in the most interesting light by his correspondence with the placid and accomplished Atticus. The learned slave whom he employed in transcribing his own works and those of his favorite authors was the companion of his literary hours and the sharer of his posthumous renown. That he and other illus-

trious Romans understood the luxuries of the library, and relished them with a keenness that would not discredit modern scholarship and taste, is proved by many precious passages, especially in his letters and his philosophical dialogues. In the third book *De Finibus Bonorum et Malorum*, this pleasant description occurs.

"Nam, in Tusculano quum essem, vellemque e bibliotheca pueri Luculli quibusdam libris uti, veni in ejus villam, ut eos ipse, ut solebam, inde promerem. Quo quum venissem, M. Catonem, quem ibi esse nescieram, vidi in bibliotheca sedentem, multis circumfusum Stoicorum libris. Erat enim, ut scis, in eo inexhausta aviditas legendi, nec satiari poterat; quippe qui ne reprehensionem quidem vulgi inanem reformidans, in ipsa curia soleret legere sæpe, dum Senatus cogeretur, nihil operæ reipublicæ detrahens; quo magis tum in summo otio, maximaque copia quasi helluari libris, si hoc verbo in tam clara re utendum est, videbatur."

That bookselling was an extensive business a little later at Rome, many passages in the classical writers of the age of Augustus and afterwards clearly prove. The names of booksellers, — the brothers Sosii, mentioned more than once by Horace, — Pollius and Secundus, and Tryphon, to whom Quintilian inscribes his work, — the designations of the quarters of the city where the trade was carried on, — the portico near Vertumnus and Janus, the Vicus Sandaliarius, and the Argiletum, which were full of booksellers' shops, with their columns covered over with advertisements and titles of new and old works, to attract the buyers as they strolled idly through the streets, — bring up to our minds a series of scenes so like what we behold in the thoroughfares of our modern towns, that we feel strangely familiar and at home among them.

"Contra Cæsaris est forum taberna,
Scriptis portibus hinc et inde totis,
Omnes ut cito perlegas poetas."

And that the copyists, the bookbinders, and the booksellers did not absorb all the pecuniary gains, we may infer from what Horace, Martial, and other men of letters, occasionally hint. Plautus and Terence, among the more ancient poets, received money for their comedies from the magistrates. Pliny the elder was offered the enormous sum of 400,000 sesterces for a work of his, as he himself states. Horace talks about the

paupertas audax, the audacious poverty that drove him to making verses, though at a later period, when he had risen into the ethereal region of court favor, he became so fastidious, that he would not expose his books to be thumbed by the vulgar, or recite them to please the loungers of the forum and the baths.

> " Nulla taberna meos habeat, neque pila, libellos,
> Queis manus insudet vulgi, Hermogenisque Tigelli;
> Nec recitem cuiquam, nisi amicis, idque coactus,
> Non ubivis, coramve quibuslibet."

Martial, who seems to have been in want of cash nearly all the time, — another coincidence with modern manners, and an almost universal law of the *genus irritabile*, — complains of the smallness of his profits, though his works were the delight of distant nations.

> " Dicitur et nostros cantare Britannia versus;
> Quid prodest? *nescit sacculus ista meus.*"

How the idea of an international copyright would have cheered the poet's heart with prophetic visions of coming coin in that painfully vacant *sacculus*, — the empty pocket, abhorred of gods and men! We cannot help sympathizing with the troubles he hints at in the last epigram of the Eleventh Book, by way of excusing haste.

> " Quamvis tam longo possis satur esse libello,
> Lector; adhuc a me disticha pauca petis;
> *Sed Lupus usuram, puerique diaria poscunt;*
> *Lector, solve;* taces, dissimulasque? vale."

How many poor authors are guilty of unconscious plagiarism, as they repeat the earnest prayer of the Roman epigrammatist, — that the reader would pay! — the interest on a note is due, the household calls for its daily bread!

At the period to which these passages refer, the writers doubtless received money from the booksellers, in proportion to their popularity and the demand for their works. Martial laughs at a lawyer who had a weakness for writing *nullos referentia nummos carmina*; — a warning to all gentlemen of that profession to let the Muses alone and mind their own business. Notwithstanding these intimations of the extent to which bookmaking and the trades connected with literature were carried, and the idea of property connected with the fact of authorship, we believe there is no indication, either in Greek or Roman law, that the protection of this important

interest ever attracted the legislator's attention for a moment. Not a provision for the benefit of authors occurs in the innumerable enactments for the security of every other species of property, in the successive ages of Greek and Roman jurisprudence. The author took his manuscript to the bibliopole, sold it for what he could get, — just as Dr. Johnson sold poor Goldsmith's Vicar of Wakefield, — and that was the last he heard from it, except through the unsatisfying notes of the trump of fame. In fact, though the writing and manufacturing of books occupied many hands, through the classical and mediæval ages, yet literary property — the right of an author in his works after the autograph copy had once passed out of his possession — cannot be said to have had any existence at all, until the invention and general introduction of the art of printing wholly changed the relation in which the author stood to the community, and extended the multiplication of copies beyond the conceptions of former ages. By the aid of this simple but wonderful mechanism, the able writer became invested with a power over the world of thought, which he could wield with the force, and almost with the speed, of lightning. But it was long before the miraculous agencies of this lever of modern civilization were fully revealed, — still longer before they were brought into unrestricted play, if, indeed, the time has yet arrived. Governments at first monopolized its use, and kindly guarded their people from the dangers which were to be apprehended from such a motive power. But by degrees the application of this method of multiplying books was graciously enlarged by admitting certain licensed persons and companies, under pretty stringent conditions, to a moderate share of the business; and so it went forward, slowly but surely, until the printing-press has become the ruling power of the world, and the interests of literature by its aid have taken their place among the most important economical, intellectual, moral, and political interests of modern times. The rights of authors now occupy the attention of national legislatures and the diplomatic representatives of states. The property of writers in the products of their own brains has been as clearly recognized, though not as completely secured, as the rights of property in other and more tangible forms. Questions pertaining to this subject and growing out of conflicting claims come, like other questions about the rights of property, before our courts of

law; and the relation of author and public, of producer and purchaser, seems likely, through the joint agency of legislation and judicial interpretation, to be finally adjusted on a permanent and satisfactory basis.

So far as we know, there is in our language no work upon Literary Property so complete and satisfactory as this treatise by Mr. Curtis. In the present notice we have barely space to give a general account of its interesting contents, without entering into any extended discussion of the numerous and important topics and principles which are handled in its pages. The literary merits of the book are of a very high order. It is written with remarkable clearness and purity of style, and is free from any attempts at rhetorical embellishment, which would be out of keeping with the proper treatment of the subject. The author has also equally avoided the dry and merely technical manner which a majority of the writers upon subjects related to the law seem to consider it a matter of professional etiquette to adopt. Apart from the interest which every man of letters may be supposed to feel in a discussion of copyright, he will find in Mr. Curtis's volume ample gratification for literary taste. In the course of the work, many curious and valuable details of literary history are introduced, and the notes are enriched with copious illustrations, drawn from biographies, criticisms, and judicial decisions bearing upon the general course of the argument, and of high importance in a literary as well as a scientific point of view. In this way the book combines a great amount and variety of information communicated in the most agreeable manner, which the reader can find collected nowhere else, and which every man occupied with intellectual pursuits should have in his possession.

It will be seen, however, that the discussion is not limited to literature. Music, Engraving, and Sculpture, the property in which has been regulated by the same general principles, receive the author's attention in a just proportion. The literary part of the subject, however, has the most comprehensive application, and involves the largest interests; for in every country, the makers of books will outnumber the artists, and the books themselves must ever be of more vital consequence to the moral and intellectual welfare of the people than machines, engravings, music, or even pictures and statues. A great number of subordinate topics are also treated of, but in

the cursory notice which is all that we can at present give of the work, they must be passed by.

The division and distribution of the subject are carefully made, so that whoever reads with ordinary attention may easily grasp the whole discussion. In the introduction, Mr. Curtis treats of the rights of authors, theoretically considered, deducing them from the principles of natural right, which lie at the foundation of every other species of property. He admits, however, that this theory leads directly and inevitably to the conclusion, that the author is entitled to the property of his works in perpetuity; and he justifies the limitation of this right in the legislation of most countries, by regarding it as a compromise between the abstract justice of the case and the convenience and interests of society. This view seems to be logically correct, and does substantial justice to every party.

There are, we think, some peculiarities in literary property, which distinguish it broadly from every other species of possession, and which further justify society for this exercise of its controlling power, — a control undoubtedly reaching beyond that to which other things are subjected. Though property may be said to have some foundation in nature, the *extent* of the right, if not as to duration of time, yet in the mode and limits of its enjoyment, is determined in all civilized societies by positive law. The value of rights of property may be seriously affected in consequence of the legislative measures which are called for by the general good; and some portions of property may be actually taken away from the individual owner by the same overruling policy that consults the greatest good of the greatest number. The material property, for instance, of one town may be seriously impaired by opening a new road, which shall double the wealth of another, if, in the opinion of the legislature, the road be required by the convenience of the public. This does not interfere, in one sense, with the perpetuity of property; but if a landholder's rental is diminished by one half, the difference to him is not very important, whether the effect is brought about in this indirect manner, or by actually depriving him of one half of his broad acres. Now what we mean to say is, that literary property, besides being to a peculiar degree, and beyond every other species of property, — except fancy stocks, — the creature of civilized society, has, what other property has not,

the capacity of instantaneous and indefinite expansion, and the protection of it in this line of its direction is a compensation for the curtailment of its extent in the line of time. Literary property, moreover, is incapable of the minute subdivision by which nearly every other species may be distributed. The copyright of a book cannot be divided like a farm, and the portions held in severalty, wholly independent of each other. The connection between the Siamese twins is not more vital than that between all the individual interests of a copyright. A species of property so intense in its vitality, if the expression may be allowed, cannot be maintained in perpetual life. The attempt to give it this species of immortality would be, not merely inconvenient, but vain. It is a species of monopoly which inevitably terminates for want of the power, and we may therefore add of the right, to enforce it. Sacred as the right of property is, the indefinite accumulation of it in undistributable masses, to which a perpetual copyright would tend, or in multiplying masses to be held in common by combinations of individuals, cannot safely become the policy of a well-ordered state, because this necessary form would combine all the attributes of a joint-stock company, with the power of indefinite expansion, and of a monopoly, with indefinite duration. We come, therefore, to the conclusion, that the essential nature of literary property, no less than a just regard to the convenience and interest of society, demands that it terminate at some definite period of time, and sustains the ground assumed by the nations in legislating upon this subject.

The lucid discussion of this question is followed by a very interesting history of literary property, in the jurisprudence of England and America. The next chapter is occupied with a most intelligible description of the subjects of literary property, before and after publication, under the several heads of manuscripts, letters, lectures, dramatic compositions, and the like, together with the rules, principles, and decisions of law applicable to each. The right of property in lectures is of particular consequence at present, since this ancient mode of conveying instruction has been revived to so remarkable a degree within the last few years. A custom has grown up, particularly in New York, of publishing in the newspapers *verbatim* reports, so called, of whole courses of lectures, delivered by eminent literary and scientific men. Mr. Agassiz, and Dr.

Nichol have been both complimented and injured in this way; for such a proceeding is as much a violation of the rights of property, unless sanctioned by the lecturer, as the act of printing a copyrighted book. Upon this subject we quote the following passage.

"In the United States, the right of property in lectures depends upon the general principles of the common law, and the statute which protects the owner of manuscripts.

"In relation to a lecture purely oral, of which the speaker has no manuscript, or any other writing which is such in its nature, as that, coupled with what is delivered orally, it may be taken that he has substantially a written composition, the common law has not gone the length of saying that he can, on the footing of property, have a remedy for an unauthorized publication. A written composition has been hitherto held to be the subject of literary property; concerning which the court must be satisfied that the publication complained of is an invasion of a written work, and this can only be done by comparing the composition with the piracy.

"But it does not follow that because the information communicated by a lecturer is not committed to writing, but orally delivered, it is therefore within the power of any person who hears it to publish it. When persons are admitted, as pupils or otherwise, to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or to take away the exclusive right of the lecturer in his own lectures. The hearer may take notes for purposes of his own information, but he may not publish them for profit.

"Accordingly, if a person attending such lectures undertakes to publish them, or furnishes another person with the means of publishing them, a court of equity will restrain such a publication, as a violation of trust and confidence, founded in contract, or implied from circumstances.

"Where a lecture has been reduced to writing, either wholly or substantially, the author has a right of property in it as a literary composition, in the same manner as in the case of other manuscripts. The admission of persons to hear such a lecture affords no presumption that the speaker intends to give them a right to publish the information which they may acquire. But when a court of equity is called upon to restrain a publication, on the ground that it is a piracy of a composition in writing, the writing must be produced.

"The act of Congress, 3d February, 1831, § 9, gives an action on the case against any person who shall print or publish any

manuscript whatever without the consent of the author or proprietor, and empowers the courts of the United States to grant injunctions according to the principles of equity, to restrain such publication. The remedy thus afforded would, without doubt, extend to the case of any lecture, of which the author could produce notes, showing that he had substantially reduced the same to writing." — pp. 101 – 103.

The third chapter shows what persons are entitled to the protection of the statutes, and the fourth relates to the character of the works claiming the protection of the law. In this portion of the work, many curious particulars are given of the exercise of individual discretion, and the influence of particular opinions upon the legal decisions of English judges. The following passage is amusing and instructive.

" *Works injurious to religion.* With regard to publications supposed to be of this character, the adjudged cases have not proceeded upon very satisfactory doctrines. The general principle upon which they proceed is the same as that which denies protection to a work injurious to public morals.

" In 1822, an application was made to Lord Eldon for an injunction to restrain a piratical edition of Lord Byron's Cain. The injunction was refused, upon the ground of a doubt, whether the poem was not intended to vilify and bring into discredit that portion of Scripture history to which it relates. His Lordship read the poem, and refused the injunction until the counsel for the plaintiff should show him that an action could be maintained at law. With great submission, I am obliged to differ from the reasoning employed by his Lordship in this case. Without entering into the question of criticism raised by comparing the poem with Paradise Lost, — upon which a great critic and poet held a very different opinion from that expressed by Lord Eldon, — and admitting that an injunction before a trial at law should not be granted in a palpable case of malicious attack upon the Scriptures or the doctrines of revealed religion, it is yet quite too strict to say, that, because a poem admits of a suspicion of improper intentions, the author's copyright is not to be protected until he has purged himself of that suspicion. The boldness and license of poetry admit of a latitude which would not be allowed in didactic prose; and where the line is to be drawn closely, the court may not only mistake the tendency and intention of the work, but may, as Lord Eldon did on this occasion, apply its own views of doctrinal subjects to determine the innocence of the author's intention, instead of judging it by that broad, liberal, and catholic spirit in which the intent of all poetry

is to be judged. If canons of criticism are to be applied in this manner, and a publication, which falls under the doubts engendered by such criticism, is to be refused protection in the first instance, there can be no safe literary property in the higher works of imagination, which deal with such subjects as man's future destiny or the events of Scripture history; for the refusal of a court of equity to grant an injunction in such cases would be only a signal to invite more piracies than the courts of law could check. It would be a far more sound rule, to hold that unless a malicious intent or mischievous tendency be apparent on its face, every work is *primâ facie* entitled to protection, until the bad intent and tendency are established by those who rely upon them.

"In another case, Lord Eldon refused to continue an injunction to restrain a pirated edition of certain lectures delivered by Mr. Lawrence at the College of Surgeons, on 'Physiology, Zoölogy, and the Natural History of Man.' He doubted whether many particular parts of the work did not lead to a disbelief in the immortality of the soul, — one of the doctrines of the Scriptures. He therefore dissolved the injunction, and left the plaintiff to bring an action at law. In this case, his Lordship said that 'he was bound to look, not only to the tenor, but also *to particular passages unconnected with the general tenor; for if there were any parts of it which denied the truth of Scripture*, or which furnished a doubt as to whether a court of law would not decide that they had denied the truth of Scripture, he was bound to look at them and decide accordingly.'

"If this is to be regarded as the statement of a rule by which to determine the validity of a copyright, it is quite unsound. It seems, however, to be only a statement of the rule that should govern a court of equity, in determining whether an injunction shall be granted before the right of property has been established at law. But even in this view, the doctrine is not satisfactory; and in announcing it, Lord Eldon is inconsistent with himself. In the previous case, in refusing an injunction to protect Lord Byron's Cain, he had said of Paradise Lost, that there are undoubtedly a great many passages in it, of which, if the promotion of Christianity were not its object, it would be very improper by law to vindicate the publication; but that, *taking it altogether*, it is clear that the object and effect were not to bring into discredit, but to promote the reverence of our religion. Here, his Lordship assumed as the criterion the general tenor of the work; and it is not very apparent why the same rule should not have been applied to Dr. Lawrence's Lectures. In the one case, the good general object of the work excuses from censure the passa-

ges which would be otherwise inexcusable. In the other case, the alleged bad character of certain detached portions, it is said, renders the general tenor of the work wholly immaterial." — pp. 150 – 155.

The very important topic of the originality necessary to a valid copyright is ably examined in the next chapter. The lines are drawn with as much precision as the somewhat indefinite nature of the subject will admit; the rights of compilers and translators in the works upon which their labors have been expended are very clearly set forth. Mr. Curtis next explains the statute requisites for a valid copyright in the United States and Great Britain, and gives a history of the legislation of the two countries upon the duration of copyright. The present state of the law is, upon the whole, quite satisfactory. In England, the author's property continues through his life, however protracted, and to his heirs for seven years after his death; and if the term of seven years expires before the end of forty-two years from the first publication, the copyright is secured for the whole period of forty-two years, so that, in any event, the property is protected for that length of time, and for a greater one according to the life of the author. In the United States, the act of Congress of 1831 secures the property of a copyright for the term of twenty-eight years, with the right of renewal for an additional period of fourteen years, so that the period of forty-two years is the legal duration of copyrighted property in this country, irrespective of the life of the author.

From the very important chapter on "Transmission of Copyright and other Incidents of Literary Property," we copy the following paragraphs.

"In the United States, in a case where a publisher agreed with an author, that the latter should prepare a certain book for the press, and the publisher engaged to pay the author a certain sum 'for the copyright of the said book,' it was held, that the resulting term, under the statute, did not pass to the publisher, and that the word 'copyright' embraced only the term then capable of being secured, which at the time of the contract constituted the copyright of the book.

"In like manner, the question may arise, whether a general assignment of copyright, by the author, will deprive his representatives of the additional term of fourteen years, given by the act of Congress of 3d February, 1831, § 2; or whether the

author himself has any power over this additional term, so far as the interests of his representatives are concerned. The statute provides that the author, if living at the expiration of the first term of twenty-eight years, shall have a further term of fourteen years, on making a new entry for that purpose. This contingent interest the author may undoubtedly assign. But if the author is not living at the end of the first term, the additional term vests in his widow and child, or children, living at the time. It is not easy to see how the author can dispose of this interest. It is not created for him, but for his family; it vests only in case of his death; and the policy of the statute, it seems to me, has removed it from his control." — pp. 234, 235.

The ninth chapter, one of the longest and ablest in the book, is devoted to a consideration of all the modes by which a copyright may be infringed. We have been particularly struck with the author's reasoning against the English doctrine, that a *bonâ fide* abridgment is no violation of copyright, — a doctrine in the highest degree absurd to the uninstructed common-sense of a layman. "If the law supposes *that*," said Mr. Bumble, speaking of the presumption, "in the eye of the law," that Mrs. Bumble acted under the direction of her husband, "the law is an ass, — an idiot. If that 's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience, — by experience." If an abridgment, in the eye of the law, is no piracy, — then the law is not an author; and the worst we wish the law is, that his eye may be opened by abridgment, — by abridgment. It appears to us that Mr. Curtis has completely disposed of this doctrine; his argument is unanswerable.

The concluding chapter explains the legal remedy for the infringement of copyright. In this country, the jurisdiction of the United States courts, in cases of copyright, was established by the statute of 1819, conferring upon them "the original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries." The Appendix to Mr. Curtis's book contains the English and American statutes, and some other documents, pertaining to the subject of patents and copyrights.